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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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Opinions Below.

The District Court rendered no opinion. The only opinion rendered by the Circuit Court of Appeals is the *per curiam* opinion on the petition for rehearing. This opinion is reported in 86 F. (2d) 942, and appears in the record at R. 29-31.

Jurisdiction.

The order of the Circuit Court of Appeals was entered December 4, 1936 (R. 18), and its order denying petition for rehearing was entered December 26, 1936 (R. 32). The petition for writ of certiorari was filed December 29, 1936, within thirty days of either of the dates last named. See C. A. R. XI,[1] 292 U. S. 665; *Craig* v. *U. S.*, 298 U. S. 637;

[1] The Rules of Practice and Procedure in Criminal Cases (292 U. S. 601) are hereinafter cited as C. A. R. or "Criminal Appeals Rules."

Weinblatt v. *U. S.*, 298 U. S. 637. The writ was granted by order of this Court of February 8, 1937 (R. 32). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938).

Statement of the Case.

Petitioner was convicted and sentenced in the District Court of the United States for the Southern District of New York for violation of the mail fraud and conspiracy statutes (R. 4-5). His timely appeal to the Circuit Court of Appeals was based chiefly upon specifications of errors occurring during the course of the trial. That court dismissed his appeal upon the ground that his bill of exceptions, although timely settled, had not been put in narrated and condensed form before its settlement.

As shown by the petition for writ of certiorari, which this Court granted on February 8, 1937 (R. 32), the case involves the question of the power of a Circuit Court of Appeals to hear and determine an appeal in a case where the bill of exceptions was timely settled but does not comply with the rules as to condensation and narration. No question of the validity of the conviction of petitioner is involved on the record before this Court on this certiorari, that record being confined to the jurisdictional and procedural aspects of the case. An understanding of them, however, involves a somewhat detailed statement of the procedure actually followed below in this case.

In the statement of grounds of appeal accompanying the notice of appeal herein (R. 9) the point was made, among others, that as a matter of law there was no evidence sufficient to sustain the verdict or judgment. It became necessary, therefore, that the bill of exceptions [2] should embrace the whole of the evidence—4,000 pages of testimony and

[2] C. A. R. IX, par. 2; Supreme Court Rule 8.

500 exhibits (R. 29)—in order that the record might show affirmatively that it contained the purport and substance of all the evidence and thus avoid the presumption that omitted evidence justified the verdict and judgment.[3] On July 27, 1936, the trial judge, on application, extended the time to file and serve the bill of exceptions and assignment of errors until November 1, 1936 (R. 15).

Financially unable to engage his trial counsel to conduct the appeal, petitioner undertook the task himself[4] with the assistance, commencing early in August, of two newly admitted members of the New Jersey bar (R. 20, 29). After these gentlemen had read the record in connection with the preparation of the assignment of errors, efforts were made to confer with Government counsel respecting the form and contents of the bill of exceptions; but these were unavailing until the middle of September, at which time such a conference was held (R. 20). Government counsel were of the opinion that no condensation at all was practicable in view of the nature of the assignments of error; but they agreed to receive and consider a sample narration and condensation of a part of the testimony (R. 20-21). Petitioner thereafter submitted a sample narration and condensation of 600 pages of the testimony. Late in September, Government counsel advised that they were correcting and redictating the condensation submitted, but that the testimony of this petitioner would have to go in *verbatim* (R. 21).

By middle October petitioner had another 1,000 pages ready for submission—but Government counsel had not at that time, and have never at any subsequent time, returned with their corrections even the first batch of narrative and condensation submitted to them (R. 21).

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[3] *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 390, 391; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 488-490.

[4] Petitioner has been a member of the Bar since 1904, but has never been in active practice (R. 20, see R. 29).

Convinced that no agreement as to a condensed and narrative bill of exceptions could be reached with Government counsel within the remaining time, petitioner applied for a further extension of time for the settlement of the bill; and Judge Patterson, who as trial judge was familiar with all the circumstances and was best able to judge what the interest of justice required, stated that he would allow a further extension of two months on October 20, 1936 (R. 21, 17 and see R. 29-30). At the hearing on this application, Government counsel stated affirmatively that they did not oppose the relief sought, but would not formally consent since they deemed the trial judge to be without power under C. A. R. IX, par. 1,[5] to grant extensions except on order made within thirty days of the taking of the appeal. Upon investigation of the opinion expressed by Government counsel, petitioner came to the conclusion that it would be unsafe to rely upon a further extension given by the trial judge[6] and no order further extending petitioner's time was entered (R. 17).

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[5] "In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice."

[6] *Yep* v. *U. S.*, 81 F. (2d) 637, 638 (C. C. A. 10); *Gallagher* v. *U. S.*, 82 F. (2d) 721, 722 (C. C. A. 8). *Cf. Wolpa* v. *U. S.*, 84 F. (2d) 829, 831 (C. C. A. 8), cert. den. Jan. 4, 1937. But *cf. Fierman* v. *U. S.*, 84 F. (2d) 968 (C. C. A. 3). Since that time there have been several decisions adopting the Government's view: *Spero* v. *U. S.*, 85 F. (2d) 134 (C. C. A. 8), cert. den. Nov. 23, 1936; *Cusomano* v. *U. S.*, 85 F. (2d) 132 (C. C. A. 8); *Slade* v. *U. S.*, 85 F. (2d) 786 (C. C. A. 10); *Cory* v. *U. S.*, 86 F. (2d) 461 (C. C. A. 9), cert. den. Feb. 8, 1937; *St. Charles* v. *U. S.*, 86 F. (2d) 463 (C. C. A. 9), cert. den. Jan. 4, 1937; *Williams* v. *U. S.*, not yet reported (C. C. A. 9), cert. den. Feb. 8, 1937.

Aware that the Circuit Court of Appeals for the Second Circuit had previously decided that Rule IX of the C. A. R. gives an individual judge of the Circuit Court of Appeals acting *ex parte* no power to grant additional extensions of time to settle bills of exceptions,[7] and that this Court had refused to review that ruling on certiorari,[8] petitioner applied for relief, not to an individual judge of the Circuit Court of Appeals, but to that court as a whole (R. 22). The theory was, that, under Rule IV of the C. A. R. entitled *"Control by Appellate Court"*, supervision and control of the appellate proceedings, "including the proceedings relating to the preparation of the record," had vested in the Circuit Court of Appeals as of the date of the filing of the duplicate notice of appeal in that court,[9] and that under that rule the Circuit Court of Appeals had specific au-

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[7] *U. S.* v. *Adamowicz*, 82 F. (2d) 288, at least when not assigned to sit in the District Court in the absence, disability or death of the trial judge, Rule XIII, C. A. R.

[8] 80 L. Ed. 747.

[9] Paragraphs 1 and 2 of Rule IV, C. A. R. provide:

"The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal."

Notices of appeal were filed by this petitioner in the trial court on June 30, 1936 (R. 6) in compliance with paragraph 3 of Rule III, C. A. R., but the trial court clerk did not file the duplicate notice with the clerk of the Circuit Court of Appeals until August 9, 1936 (see endorsements, R. 10). While the control of the appeal vested in the appellate court as of the latter date and, therefore, existed at the time (October 20-27, 1936) of the application for relief to the appellate court referred to in the text above, the delay by the trial court clerk of forty days in filing the notice of appeal can scarcely be squared with the requirement of Rule IV that he shall file it "immediately"; and this is but one of a number of instances of practical disregard of the C. A. R. exhibited by this case.

thority to "modify any order made by the trial judge or by any judge in relation to the prosecution of the appeal • • •", and could modify the extension order of July 27 to allow a longer time for settlement of the bill of exceptions. The application for relief under Rule IV was heard by the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ), through the medium of a bi-party argument on October 27, 1936 (R. 22), and the view as to the scope of the power of that court under Rule IV as above set forth was specifically pressed upon the court (R. 22).

While the Circuit Court of Appeals rendered no written opinion upon this application, the judges present at the hearing then indicated (a) that they doubted the power of the trial judge to grant a further extension; (b) that they did not regard Rule IV as giving the Circuit Court of Appeals the power suggested; but (c) they unanimously suggested, as a compromise measure, that in the circumstances of this case, and in order to avoid any jurisdictional question, an application should be made to the trial judge for an order settling the stenographer's verbatim transcript as the bill of exceptions, and that thereafter an application might be made to the Circuit Court of Appeals for time to prepare, agree upon and print a condensed and narrative record under Rule IX, par. 4, C. A. R. (R. 23).[10]

As appears by the uncontradicted affidavit of this petitioner in the record now before this Court (R. 23), the following occurred in connection with the hearing of the application discussed immediately above:

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[10] The rule provides that after the bill of exceptions has been settled and the record on appeal filed with the clerk of the Circuit Court of Appeals:

> "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or *reduction* of the record filed with the appellate court, and may issue such directions to the trial court or trial judge, in relation thereto, as may be appropriate." [Emphasis added.]

> "Judge Hand at this time stated in substance, 'I do not believe that you will oppose such an application, Mr. Brower.' Mr. Brower stated that he might oppose this application. Whereupon, Judge Hand said in substance, 'I think that upon reconsideration, you will withdraw your opposition.' And Judge Manton said in substance, 'That is the direction of this court.' "

On the following day petitioner applied to Judge Patterson to settle the stenographer's minutes as the bill of exceptions; and this motion was opposed by Government counsel upon the ground that the trial judge was without power to do so since the requirements as to condensation and narration had not been complied with (R. 23). Judge Patterson at first granted the motion and signed an order settling the bill of exceptions in the form presented, but shortly thereafter struck his signature and denied the motion (R. 24). Petitioner immediately applied to the Senior Circuit Judge, who agreed to convene the Circuit Court of Appeals to hear an application for mandamus or other relief; but before this proceeding had been consummated a conference was held with Judge Patterson and Government counsel in the chambers of the Senior Circuit Judge at which time Judge Patterson suggested that petitioner strike the colloquy of counsel from the stenographer's minutes, thus accomplishing a condensation, and appear before him on the following Monday, November 2, for settlement of the bill (R. 24). This was done and the minutes again presented for settlement on Monday, November 2. Judge Patterson at first refused to settle the bill, on the Government's suggestion that it was presented out of time and that he was without power to do so; but, later on the same day, being convinced that Sundays are excluded from the count under the C. A. R., he signed an order settling the stenographer's minutes, as condensed, as constituting the bill of exceptions (R. 25).

As appears by the uncontradicted affidavit of this petitioner in the record before this Court, "Judge Patterson stated that error might have been committed and that he did not wish to deprive your petitioner of his appeal" (R. 25).

On the same day, November 2, 1936, the settled bill of exceptions and assignment of errors were filed with the clerk of the trial court [11] (R. 25), in compliance with paragraph 1 of Rule IX, C. A. R.

On November 4, desiring to withdraw the bill of exceptions from the office of the clerk of the Circuit Court of Appeals in order to finish the narrative thereof for the use of that court pursuant to the procedure previously suggested by the Circuit Court of Appeals, petitioner secured an order from the Senior Circuit Judge dated November 5, 1936, directed to the clerk of the Circuit Court of Appeals,

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[11] It thereupon became the mandatory duty of the clerk of the trial court to send the record, including the bill of exceptions and assignment of errors, to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX, C. A. R., which reads as follows:

> "Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal."

The clerk of the trial court has never taken any steps whatever to comply with this rule, and, according to the best information that this petitioner can obtain, does not intend to do so (see affidavit of Silberman, Pet. p. 39). When petitioner and his assistants appeared in the office of the clerk of the trial court and demanded that the bill of exceptions and the rest of the record be sent to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX, the clerk of the trial court said that he had never heard of any such practice, and that such procedure is never followed in his office, but that the appellant was required to make deposit for printing with the trial court clerk and have the record printed by him before it was sent to the Circuit Court of Appeals; and that this old practice which formerly obtained was still followed by his office, the C. A. R. to the contrary notwithstanding (affidavit of Silberman, Pet. 38-39).

to permit petitioner to withdraw the bill of exceptions from the clerk's office for that purpose (see affidavit of Silberman, Pet. p. 37). It was then discovered that neither the bill of exceptions nor any other part of the record had been transmitted to the Circuit Court of Appeals by the District Court clerk.

Meanwhile, and on November 16, 1936, Government counsel secured from the clerk of the trial court certified copy of the docket entries in the case and certificate that appeal had been allowed (R. 1-6, 12), and moved the Circuit Court of Appeals to docket and dismiss the appeal under Rule XIV of the Circuit Court of Appeals [12] upon the ground that petitioner had failed to docket the case in the Circuit Court of Appeals in time, and because the bill of exceptions was not settled in compliance with Rule IX, C. A. R. (R. 11). The affidavit of Government counsel in support of the motion to docket and dismiss raised both the contention that the bill of exceptions was ineffective because not in condensed and narrative form, and that it had been allowed and settled out of time (R. 14). By opposing affidavit your petitioner called attention of the Circuit Court of Appeals to the facts of which it was already aware, and which have been detailed above, including the fact that the procedure which the petitioner had followed with respect to the bill of exceptions was that suggested by the Circuit Court of Appeals itself (R. 16-18).

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[12] Reading (so far as is pertinent) as follows:

> "In criminal cases it shall be the duty of the appellant to docket the case and file the record within the time fixed by Rules VIII and IX of the rules of the Supreme Court in criminal cases. If the appellant shall fail to comply with this rule, the appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed."

On December 4, 1936, the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ.) entered an order dismissing the appeal "for lack of jurisdiction" (R. 18). No opinion was delivered in connection with this order.

On December 9, and well within the time allowed by the Circuit Court of Appeals Rules (Rule XXVI, C. C. A.), petitioner filed an application for a rehearing (R. 19-27), duly sworn to by himself (R. 28) and by Messrs. Silberman & Stern (R. 27-28), who are the two members of the New Jersey bar who had been assisting him, and who were aware of the facts and proceedings as stated herein. This petition recited these facts and proceedings at length; renewed the arguments for the construction of the C. A. R. previously advanced; specifically requested the Circuit Court of Appeals to exercise its discretionary power under the C. A. R. to accord petitioner relief; asserted that failure so to do would constitute an abuse of discretion; and prayed that, at the least, the Circuit Court of Appeals should indicate the ground of its decision in order that review in this Court might be had (R. 27).

The facts stated in this petition for rehearing with respect to the proceedings (as hereinbefore detailed) were not controverted by the Government nor questioned by the Circuit Court of Appeals in its subsequent opinion or otherwise.

The Circuit Court of Appeals held the application for about two weeks, and on December 22 announced its *per curiam* opinion (R. 29-31) and its order (R. 32). The opinion recites the case was pending on "motions for reargument of motions to correct the record, also to dismiss the appeal" (R. 29), and it concludes, "The motion to amend the record is denied and the motion to dismiss the appeal is granted." The order recites the denial of a motion "for a reargument of the motions to correct the record and dismiss the appeal" (R. 32). As a matter of fact, there was

never any motion to amend or correct the record. There was never any question as to the accuracy of the record, nor any attempt to correct it. What your petitioner had urged in opposition to the motion to docket and dismiss and in support of the petition for rehearing was that the Circuit Court of Appeals, among other courses, has authority under paragraph 4 of Rule IX, C. A. R., to direct a "*reduction* of the record" to condensed and narrative form in order to comply with the requirements, and that it can do that either by remitting the record to the trial court, or by letting the record, including the bill of exceptions as settled, stand as and when filed in the Circuit Court of Appeals, but having the work of completing the narrative condensed version of that bill done by counsel in the Circuit Court of Appeals, and the case argued on the basis of that condensed narration.

The opinion of the Circuit Court of Appeals upon the petition for rehearing did, however, accede to the request of petitioner for a statement of the grounds of decision. The opinion makes the following rulings:

(1) That in view of the exclusion of Sundays and holidays in computing the time under the C. A. R. (Rule XIII, C. A. R.), the settlement of the bill of exceptions on Monday, November 2, was timely and was within the period of the initial extension (R. 30);

(2) but that the appeal must be dismissed because the assignment of errors included a contention of lack of evidence to support the indictment, and this required an examination of all the evidence, and that since the bill of exceptions was not in condensed and narrative form, it was insufficient (R. 31).

In making this ruling, the Circuit Court of Appeals took no exception to the accuracy, inclusiveness or timeliness of the settlement of the bill of exceptions, but placed its ruling

squarely and solely on the ground that it was not in narrative and condensed form.[13]

(3) that the Circuit Court of Appeals could not remit the record to the District Court to permit the narration and condensation to be accomplished, because the time for the settlement of the bill of exceptions had expired; and that in this aspect the time limitation provisions of Rule IX, C. A. R., must be regarded as making the rule of *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, inapplicable in criminal cases (R. 31);

(4) that the provisions of Rule IX, C. A. R., authorizing the Circuit Court of Appeals to entertain a motion by either party for the correction, amplification or reduction of the record filed with the appellate court or to issue directions to the trial court in relation thereto do not authorize the Circuit Court of Appeals to do so with reference to the bill of exceptions.

(5) After placing its decision squarely upon grounds of lack of jurisdiction and power, the Circuit Court of Appeals added briefly at the end of its opinion: "The appellant had four months and has offered insufficient excuses for his delinquency" (R. 31).

Specification of Errors.

1. The Circuit Court of Appeals erred in dismissing the appeal upon the ground the bill of exceptions was not in condensed and narrative form.

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[13] It may be noted, in addition, that due to the disregard of rules by the trial court clerk the assignment of errors was not before the Circuit Court of Appeals and that court had no means of knowing, and apparently did not inquire, whether there were any assignments going to errors on the record proper which would require consideration even in the absence of a bill of exceptions. While petitioner does not suggest that such was the fact, yet the point is mentioned here to indicate the dangers which inhere in the disregard of orderly procedure.

2. The Circuit Court of Appeals erred in holding that it was without power to direct or permit the reduction of the bill of exceptions to condensed and narrative form.

3. The Circuit Court of Appeals erred in holding it could not remit the record to the District Court to permit narration and condensation.

4. The Circuit Court of Appeals abused its discretion in dismissing the appeal under the circumstances of this case.

5. The Circuit Court of Appeals erred in dismissing the appeal when it did not have the assignment of errors and bill of exceptions before it.

Summary of Argument.

Point I.

THE RULING OF THE CIRCUIT COURT OF APPEALS DISMISSING THE APPEAL FOR WANT OF NARRATION AND CONDENSATION OF THE BILL OF EXCEPTIONS WAS BASED UPON A CONCEIVED LACK OF POWER TO AFFORD PETITIONER ANY RELIEF IN THE PREMISES. IF IT CAN BE VIEWED AS A REFUSAL TO EXERCISE A DISCRETIONARY POWER, IT CONSTITUTED A GROSS ABUSE OF DISCRETION.

Point II.

THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT IT WAS WITHOUT POWER TO REMIT THE RECORD TO THE DISTRICT COURT FOR COMPLIANCE WITH THE REQUIREMENT AS TO CONDENSATION AND NARRATION OF THE BILL OF EXCEPTIONS.

Point III.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE CRIMINAL APPEALS RULE DID NOT VEST IT WITH DISCRETIONARY POWER TO DIRECT OR PERMIT THE REDUCTION OF THE BILL OF EXCEPTIONS TO CONDENSED AND NARRATIVE FORM.

Point IV.

THERE HAS BEEN SERIOUS DISREGARD OF ORDERLY PROCEDURE BY THE CLERK OF THE UNITED STATES DISTRICT COURT AND IN THE DETERMINATION OF THE APPEAL BY THE CIRCUIT COURT OF APPEALS.

Point V.

THE BILL OF EXCEPTIONS HEREIN WAS SETTLED AND FILED WITHIN THE TIME REQUIRED BY C. A. R. RULE IX.

POINT I.

The Ruling of the Circuit Court of Appeals Dismissing the Appeal for Want of Narration and Condensation of the Bill of Exceptions Was Based Upon a Conceived Lack of Power to Afford Petitioner Any Relief in the Premises. If It Can Be Viewed as a Refusal to Exercise a Discretionary Power, It Constituted a Plain Abuse of Discretion.

Petitioner believes that a reading of the opinion below makes it clear that the order of dismissal was based upon the ground of want of power. Moreover, the events in the four or five days immediately preceding the settlement of the bill of exceptions make it apparent that the Circuit Court of Appeals was willing, and even anxious, to find for petitioner a way out of his difficulties. The remedial procedure it finally suggested and directed to be followed was the settling of the stenographer's verbatim transcript as the bill of exceptions with the understanding that an application would thereafter be made to it for time to prepare, agree upon, and print a condensed and narrative record under Rule IX, Par. 4, C. A. R. (R. 23). The dismissal of the appeal because the bill of exceptions had been settled in this form could only have resulted from a determination, after reconsideration, that the suggested pro-

cedure was beyond its power. Otherwise, the action taken would have been capricious and arbitrary.

But if the decision below is to be regarded as a discretionary refusal to accord relief within the power of the appellate court to grant, then it must be reversed because constituting a patent abuse of discretion. In *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 386, 387, the appellant had totally failed to observe the requirements respecting condensation and narration, and the Circuit Court of Appeals, which had previously consistently overlooked such failures, took notice of it in that case and dismissed the appeal. This Court held that it was within the power of the Circuit Court of Appeals to remit the transcript to the trial court so that full compliance might be had with the rule respecting condensation and narration. It further held that the Circuit Court of Appeals had abused its discretion in dismissing the appeal rather than in remitting the transcript. The abuse was said to lie in the fact that the harsh penalty of dismissal was invoked "notwithstanding the transgression was largely due to its [the Circuit Courts of Appeals'] own course of action" in being lax in enforcement of the rule in prior cases.

This is not the *Barber Asphalt* case. We do not place our argument upon the ground that in other criminal cases the Circuit Court of Appeals has been lax in enforcing the rules as to condensation and narrative—although we are informed that such is the fact. This case is worse than the *Barber Asphalt* case from the standpoint of abuse of discretion. Here was no mere laxity in previous cases which lulled counsel into a sense of security. Here the appellate court, when a motion for relief was made to it under Rule IV, C. A. R., affirmatively took a hand in the situation, ruled that the relief asked for was not proper, suggested that it had the very power which it now denies that it has, and

directed that the precise procedure followed by this petitioner should be followed. If the Circuit Court of Appeals does have the power which it thought it had at the hearing on October 27, and which this petitioner maintains that the rules intended it to have, then we can conceive of no greater abuse of discretion than in refusing, in the circumstances of this case, to exercise it.

At the time this suggestion and direction were made by the appellate court, the petitioner had already reduced to narrative form a substantial portion of the evidence and he still had six days left before the settlement date. While it is true that the Government had not at that time agreed to any of the narrative, it cannot be assumed that if the Circuit Court of Appeals had not suggested this alternative procedure and had merely denied the relief under Rule IV that the petitioner could not have completed the narration of the remaining evidence within the time and procured the trial judge to settle it even if the Government would not agree. Moreover, as appears by the affidavit of Mr. Silberman (Pet. p. 39), it was stated to the Circuit Court of Appeals on behalf of the petitioner, at the argument on October 27, that this petitioner, so far as he was concerned, could complete his narration and condensation for settlement within the time still remaining. If that procedure had been followed and the bill settled without the Government's concurrence, then the Government, if so advised, could have come into the Circuit Court of Appeals afterwards and moved on five days' notice under par. 4 of Rule IX, C. A. R., to correct or change the record. The Circuit Court of Appeals, however, suggested and "directed" that petitioner should present the stenographer's minutes for settlement as the bill of exceptions, and thereafter get together with the Government for a condensation. This procedure was put forward by the Circuit Court of Appeals "in order to avoid any jurisdictional

question" (R. 23). By the suggestions and directions of the appellate court, therefore, the appellant was lulled into a situation which was far more the result of the action of the appellate court itself than in the *Barber Asphalt* case, and which had far more than the "implied sanction" of the appellate court referred to in that case.

Point II.

The Circuit Court of Appeals Erred in Ruling that It Was Without Power to Remit the Record to the District Court for Compliance with the Requirements as to Condensation and Narration of the Bill of Exceptions.

The decision of the Court in the *Barber Asphalt* case makes it plain that normally the Circuit Court of Appeals does have the power to remit the record to the lower court for compliance with the rules as to narration and condensation. The power has been denied in this case by the Circuit Court of Appeals solely upon the ground that the doctrine of that case is no longer applicable to criminal appeals by virtue of the time limitation contained in Rule IX of the Criminal Appeals Rules.

It is true that this Court in the *Barber Asphalt* case adverted to the fact that in equity the power of the trial court to settle the statement of evidence is not limited to the term at which the case was decided. But the basis of the *Barber Asphalt* decision is much broader than this. It rests upon the doctrine that the Circuit Court of Appeals has power to take whatever action may be necessary in order to preserve its appellate jurisdiction. As this Court said in the *Barber Asphalt* case:

> "The Circuit Court of Appeals, by remitting the transcript for compliance with the equity rule, would be in effect directing action in aid of its appellate jurisdiction; and the District Court, in conforming to

the direction, would be recognizing, rather than encroaching, on that jurisdiction. * * *"

The important point in this case is that the bill of exceptions was signed and settled within the time required by the Criminal Appeals Rule IX. There is no question involved as to the accuracy or completeness of the bill of exceptions and the only requirement of any rule that has not been observed is the requirement of Supreme Court Rule 8 that the bill of exceptions shall be in narrated and condensed form.

The history of the rules of this Court requiring condensation and narration clearly demonstrates that these requirements have always related only to a matter of form. They have never governed the procedure, either at law or in equity, by which the evidence became incorporated in the record. The doctrine has always been that the evidence received in a suit in equity cannot become part of the record until made so by some act of the court or judge. Beginning with the first judiciary act of 1789, successive statutes had recognized and sanctioned this doctrine—but they had differed widely as to the form in which the evidence should be presented when so incorporated.[14] At law the evidence always became part of the record by means of the bill of exceptions.

Equity Rule 75b was promulgated in 1912. The requirement respecting condensation and narration was not drawn from the earlier practice but was new. *Barber Asphalt, supra,* at p. 386. As has been heretofore shown, the purpose of Equity Rule 75b was not to initiate a procedure by which the evidence in equity was to become part of the record, but was solely to settle and make uniform the form in which the evidence should be so incorporated. *Barber*

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[14] *Barber Asphalt, supra,* at p. 381; Griswold and Mitchell, The Narrative Record in Federal Equity Appeals, 42 Harv. L. Rev., 483, 487-489.

Asphalt, supra, at p. 381. This equity rule rested in part on statutes of long standing authorizing the Supreme Court "generally to regulate the whole practice to be used in suits in equity" in the District Courts (Rev. St. 913, 917; 28 U. S. C. 730, 723; *Barber Asphalt, supra,* at p. 380); and in part on a new statute enacted February 13, 1911, c. 47, 36 Stat. 901, 28 U. S. C. 865, 866), providing that in any cause or proceeding wherein final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States Circuit Court of Appeals "the appellant or plaintiff in error, in making up and printing the transcript," shall include "such part or abstract of the proofs as the rules of such Circuit Court of Appeals may require, *and in such form as the Supreme Court of the United States may by rule prescribe.*"

The portion of the 1911 statute, emphasized in the above quotation, gave the Supreme Court power, by rule, to regulate the form in which the evidence should be prepared for incorporation into the record. *Barber Asphalt, supra,* at p. 382. Unlike R. S. 913 and 917 which limited the Supreme Court's rule-making power to *equity* cases, the Act of 1911 conferred a limited rule-making power in respect to the *form* of making up the bill of exceptions in law cases as well. *Barber Asphalt, supra,* at p. 382.

Following this 1911 Act, and consonant with the narrow rule-making power in law cases then given it, this Court on December 22, 1911 amended its own Rule 4 to require that district courts in allowing bills of exceptions should give effect to a new requirement that only the evidence necessary to the question of law as to which exceptions were reserved should be set out and that this should be set forth "in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise" (222 U. S. Appendix,

1, 8).[15] This new requirement of Rule 4 of the Rules of 1911 was carried without change into Rule 7 of the Rules of February 13, 1925 (266 U. S. 645, 658) and into Rule 8 of the present Rules of this Court (286 U. S. 598).

The new narration and condensation requirements of both Equity Rule 75b (in respect of suits in equity) and Supreme Court Rule 4 (now Rule 8) were, therefore adopted within a few months of each other (one December 22, 1911, the other May 4, 1912), pursuant to authority of the same statute (Act of February 13, 1911, *supra*), and they both related solely to *form*. Neither rule initiated the requirement, both at law and in equity, that the evidence did not become part of the record until made so by act of the court or judge; and neither rule set any time limit for the doing of that act. As to the requirement of judicial settlement or approval in equity, the long standing of that requirement has already been noted above. At law, this requirement had long been a common law rule. (*Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463.)

It thus appears that a bill of exceptions settled within the time given by Rule IX, but not in compliance with Rule 8, is a timely bill of exceptions exhibiting a *formal* defect. A bill of exceptions containing verbatim testimony is a bill of exceptions, nonetheless. It is not a nullity. The crux of the Government's argument is that condensation and narration at this time involve a resettling of the bill of exceptions, which obviously cannot be done at this date. This was clearly the view of the Circuit Court of Appeals (R.

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[15] Prior to this amendment of Rule 4 in 1911, the rules of this Court relating to bills of exceptions contained no requirement as to narration or condensation. The prior rules contained only prohibitions on the inclusion of the court's charge at large or general exceptions to charges, and to requiring particularity and distinctness in the specification of the matters of law in the charge to which exception was taken. See Rule 38 of the rules of this Court of March 13, 1832, and Rule 4 of the rules of the December term, 1858.

31). Under par. 4 of Rule IX, C. A. R., the Circuit Court of Appeals is expressly given power to order a "reduction of the record filed with the appellate court and may issue such directions to the trial court or trial judge as may be appropriate." The purpose of condensation and narration is to shorten the length of records on appeal. The process is summed up perfectly in the term "reduction" as used in Rule IX. Such a process cannot be regarded, as the Circuit Court of Appeals regarded it, as amounting to a "correction" or "change" (R. 31). The substance of the bill of exceptions as filed remains unimpaired; it is merely telescoped into fewer pages.

Having determined that Rule 8 has the same basis as Equity Rule 75b, any reason for a distinction between the condensation requirements in equity and in a criminal case must be found in the C. A. R. The only change made by the C. A. R. was in the *length* of time allowed in settling a bill of exceptions. The time within which to settle and file the bill of exceptions was changed from the expiration of the term to thirty days from the filing of the notice of appeal (C. A. R. Rule IX). The requirement of condensation was left unchanged. Rule IX merely provides that the bill of exceptions shall be in the form prescribed by Rule 8 of the Supreme Court. This, it is submitted, is no more than a provision that bills of exceptions shall be in the form as heretofore.

The time limit upon settling the bill of exceptions, contained in Rule IX, C. A. R., thus, creates no bar to the application of the doctrine of *Barber Asphalt* to a criminal case. Indeed, the conclusion is inescapable that par. 4 of Rule IX incorporates that doctrine in terms in the C. A. R. This Court in the *Barber Asphalt* case did nothing more nor less that order a "reduction of the record filed with the appellate court" and issued "such directions to the trial court, or trial judge, in relation thereto, as" were "appropriate."

Point III.

The Circuit Court of Appeals Erred in Holding that the Criminal Appeals Rules Did Not Vest It with Discretionary Power to Direct or Permit the Reduction of the Bill of Exceptions to Condensed and Narrative Form.

We believe that the new Criminal Appeals Rules provide an additional and more speedy and flexible procedure even than that of remission of the record to the trial court for condensation and narration of the bill of exceptions. In holding itself without power to give petitioner any relief in the premises, the Circuit Court of Appeals, it is submitted, has failed to appreciate the purpose and spirit of the new rules. These rules are not drawn to govern all the details of procedure in criminal cases. In contrast with the lengthy and involved rules of procedure in many States, these new rules establish a few guiding principles and invest the appellate court with an immediate control of appeals and with a wide discretion to make such orders as shall be necessary to meet the exigencies of particular cases. This is apparent from the face of the rules themselves. Thirteen short rules are designed to cover the whole of Federal appellate procedure. For present purposes it is sufficient to note only Rule IV, par. 2, and Rule IX, par. 4. These provide:

> "From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal." (C. A. R., IV par. 2.)
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> "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate." (C. A. R. IX, par. 4.)

Under the rule last quoted, as previously pointed out, condensation and narration may be accomplished by exercise of the power of the Circuit Court of Appeals to order a reduction of the record. This *may* or *may not* be done by directions to the trial court. The rule is clearly broad enough to authorize the Circuit Court, where a bill of exceptions has been settled and filed containing all the evidence verbatim, and as to the accuracy of which there is no question, to direct the parties within such time as that court deems proper to file a condensation and narrative for use at the hearing of the appeal. Such a procedure involves no resettling of the bill of exceptions. It is supplying a convenient form of the existing bill of exceptions to aid the appellate court and thereby complying with a rule of form and procedure which, after all, is primarily for the benefit of that court.

It is submitted that both of the procedures urged above (Points II and III) are in harmony with the letter, as well as the spirit, of the C. A. R. Flexibility, with control in the appellate court, is the keynote of the new rules. The rigid construction of the rules adopted by the Circuit Court of Appeals in this case will serve to defeat its own purpose. The difficulties attendant upon the narration of long records are well known to the bench and bar of the Federal Courts.[16]

If it be established that narration must be accomplished before the expiration of the time for the settlement of the bill of exceptions, no matter what the exigencies of the particular situation may be, the inevitable result will be for counsel to insist upon, and for trial judges to grant, inordinately long extensions of time in the first instance. This would contribute to delay in a greater percentage of

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[16] Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, prepared by the Advisory Committee on Rules for Civil Procedure, appointed by the Supreme Court of the United States, pp. XV and 135 *et seq.*

cases than would be the fact if the appellate court had the discretionary power to control the time for narration as the circumstances of each case might warrant. We do not wish to be understood as urging that a proper construction of the C. A. R. would permit narration to be accomplished as a matter of course in the Circuit Court of Appeals in all cases. We argue only that a proper construction will vest in the appellate court a remedial power to be exercised in its sound discretion.

POINT IV.

There Has Been Serious Disregard of Orderly Procedure by the Clerk of the United States District Court and in the Determination of the Appeal by the Circuit Court of Appeals.

As pointed out in the statement of facts (*ante*, p. 12, footnote 13) and as developed in the petition for certiorari (pp. 17-20), the Clerk of the District Court of the United States in this case, in flat disregard of the mandate of C. A. R. IX, par. 3, has never sent the record to the Circuit Court of Appeals. The hearing in the Circuit Court of Appeals was had upon a transcript of docket entries and upon the Government's motion to docket and dismiss—which, as pointed out in the petition for certiorari and as admitted in the Government's brief in opposition to the petition for certiorari, was improper procedure.

The result of these errors has been not only to cause serious inconvenience to the petitioner, but it has also resulted in the Circuit Court of Appeals' dismissing the appeal without even having a copy of the assignment of errors before it. For all that the record before this Court shows, there are assignments of error going to errors on the record proper which would require the Circuit Court of Appeals to hear and determine the appeal even in the absence of any bill of exceptions at all.

These matters—i. e., the failure and refusal of the District Court Clerk to obey the Rule requirement as to sending up of the record; the erroneous action of the Circuit Court of Appeals in entertaining a motion to docket and dismiss; and the disposal of the appeal without reference to the assignments of error, while not dispositive of this case, evidence departures from orderly procedure which should not be overlooked.

POINT V.

The Bill of Exceptions Herein Was Settled and Filed Within the Time Required by C. A. R. Rule IX.

On this point the Circuit Court of Appeals held with the petitioner (R. 30). The contrary argument made by the Government in opposition to the petition for certiorari has been, we believe, sufficiently disposed of in the reply brief on the petition, and will not be repeated here.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals dismissing the appeal herein should be reversed and the cause remanded with proper instructions, to the end that narration and condensation of the evidence may be accomplished and the appeal heard on the merits.

Respectfully submitted,

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